



**6560-50-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 257**

**[EPA-HQ-OLEM-2017-0613; FRL-9972-95-OLEM]**

#### **Oklahoma: Approval of State Coal Combustion Residuals State Permit Program**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability; request for comment.

**SUMMARY:** Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is proposing to approve the application submitted by the Oklahoma Department of Environmental Quality to allow the Oklahoma Coal Combustion Residuals (CCR) state permit program to operate in lieu of the Federal CCR program. EPA has preliminarily determined that Oklahoma's program meets the standard for approval under RCRA. Once approved, the State program requirements and resulting permit provisions will be subject to EPA's inspection and enforcement authorities under RCRA and other applicable statutory and regulatory provisions as discussed below. This notice also announces that EPA is seeking comment on this proposal during a 45-day public comment period, and is providing an opportunity to request a public hearing within the first 15 days of this comment period.

**DATES:** Comments must be received on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. In addition, a public hearing request must be submitted on or before **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2017-0613, at <https://www.regulations.gov> or by mail to: EPA Docket Center, Environmental

Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Mary Jackson, Office of Resource Conservation and Recovery, Environmental Protection Agency; *telephone number:* (703) 308-8453; *e-mail address:* jackson.mary@epa.gov.

**SUPPLEMENTARY INFORMATION:** Throughout this document “we,” “us,” and “our” means the EPA.

## **I. General Information**

### *A. Overview of Proposed Actions*

EPA is proposing to approve Oklahoma’s CCR state permit program application, pursuant to RCRA 4005(d)(1)(B). Oklahoma’s proposed program would allow the Oklahoma Department of Environmental Quality (ODEQ) to enforce rules promulgated under its solid waste statute related to CCR activities in non-Indian Country, as well as to handle permit

applications and to enforce permit violations. If approved, Oklahoma's CCR permit program will operate in lieu of the Federal CCR program, codified at 40 CFR Part 257, Subpart D.

This notice also announces that EPA is seeking comment on this proposal, and providing an opportunity to request a public hearing on whether the State's program is at least as protective as the federal program. If there is significant interest shown in holding a public hearing EPA will then hold a public hearing. Please submit any request for a public hearing within the first 15 days of the public comment period through the Contact Us form on the following web page:

(<https://www.epa.gov/coalash>). If the desire for a public hearing is demonstrated EPA will hold the hearing at the Oklahoma Department of Environmental Quality building located at 707 N Robinson Ave, Oklahoma City, OK on February 13, 2018 starting at 9 am. EPA will post a confirmation of the public hearing in the docket and on the EPA CCR website (<https://www.epa.gov/coalash>) providing information for the hearing.

EPA has also engaged federally-recognized Tribes within the State of Oklahoma in consultation and coordination regarding the program authorizations for ODEQ. EPA has established opportunities for formal as well as informal discussion throughout the consultation period, beginning with an initial conference call on October 19, 2017. Tribal consultation will be conducted in accordance with the EPA policy on Consultation and Coordination with Indian Tribes (<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>).

### *B. Background*

CCR are generated from the combustion of coal, including solid fuels classified as anthracite, bituminous, subbituminous, and lignite, for the purpose of generating steam for the purpose of powering a generator to produce electricity or electricity and other thermal energy by

electric utilities and independent power producers. CCR includes fly ash, bottom ash, boiler slag, and flue gas desulfurization materials. CCR can be sent off-site for disposal or beneficial use or disposed in on-site landfills or surface impoundments.

On April 17, 2015, EPA published a final rule, creating 40 CFR Part 257, Subpart D, that established a comprehensive set of minimum requirements for the disposal of CCR in landfills and surface impoundments (80 FR 21302). The rule created a self-implementing program which regulates the location, design, operating criteria, and groundwater monitoring and corrective action for CCR disposal, as well as regulating the closure and post-closure care of CCR units and requiring recordkeeping and notifications for CCR units. The regulations do not cover the “beneficial use” of CCR as that term is defined in § 257.53.

### *C. Statutory Authority*

EPA is issuing this proposed determination pursuant to section RCRA sections 4005(d) and 7004(b)(1). See 42 U.S.C. 6945(d), 6974(b)(1).

Section 2301 of the 2016 Water Infrastructure Improvements for the Nation (WIIN) Act amended Section 4005 of the Resource Conservation and Recovery Act (RCRA), creating a new subsection (d) that establishes a Federal permitting program similar to those under RCRA subtitle C and other environmental statutes. See 42 U.S.C. 6945(d). Under the WIIN Act, states may develop and submit a CCR permit program to EPA for approval; once approved the state permit program operates in lieu of the Federal requirements. See 42 U.S.C. 6945(d)(1)(A).

To become approved, the statute requires that a State provide “evidence of a permit program or other system of prior approval and conditions under State law for regulation by the State of coal combustion residuals units that are located in the State.” See 42 U.S.C. 6945(d)(1)(A). In addition, the statute directs that the State submit evidence that the program

meets the standard in section 4005(d)(1)(B), i.e., that it will require each coal combustion residuals unit located in the State to achieve compliance with either: (1) the Federal CCR requirements at 40 CFR Part 257, Subpart D; or (2) other State criteria that the Administrator, after consultation with the State, determines to be at least as protective as the Federal requirements. See 42 U.S.C. 6945(d)(1)(B).

EPA has 180 days from receiving a complete application to make a final determination, and must provide public notice and an opportunity for public comment. See 42 U.S.C. 6945(d)(1)(B).

To receive EPA approval, EPA must determine that the state program requires each CCR unit located in the state to achieve compliance either with the requirements of 40 CFR Part 257, Subpart D, or with state criteria that EPA determines (after consultation with the State) to be at least as protective as the requirements of 40 CFR Part 257, Subpart D. See 42 U.S.C. 6945(d)(1)(B). EPA may approve a proposed state permit program in whole or in part. *Id.*

Once a program is approved, EPA must review the program at least every 12 years, as well as no later than 3 years after a revision to an applicable section of 40 CFR Part 257, Subpart D, or 1 year after any unauthorized significant release from a CCR unit located in the state. See 42 U.S.C. 6945(d)(1)(D)(i)(I)-(III). EPA also must review a program at the request of another state alleging that the soil, groundwater, or surface water of the requesting state is or is likely to be adversely affected by a release from a CCR unit in the approved state. See 42 U.S.C. 6945(d)(1)(D)(i)(IV).

In a state with an approved CCR program, EPA may commence administrative or judicial enforcement actions under RCRA § 3008 if the state requests assistance or if the EPA determines

that an EPA enforcement action is likely to be necessary to ensure that a CCR unit is operating in accordance with the criteria of the permit program. See 42 U.S.C. 6945(d)(4).

## **II. Oklahoma's Application**

ODEQ issued a Notice of Rulemaking Intent related to its proposed CCR program and accepted public comments from December 1, 2015 through January 13, 2016. ODEQ then published an Executive Summary rulemaking document that included the public comments received and the ODEQ responses.

In September 2016, ODEQ promulgated Oklahoma Administrative Code (OAC) Title 252 Chapter 517 *Disposal of Coal Combustion Residuals from Electric Utilities*, establishing its CCR program. OAC 252:517 incorporates all of the federal regulations at 40 CFR Part 257, Subpart D, with some minor modifications as discussed below.

On July 31, 2017 Oklahoma submitted to EPA its initial application. The State supplemented its original application on October 18, 2017. EPA determined that the application was complete and notified Oklahoma of its determination by letter dated December 21, 2017.<sup>1</sup>

EPA is aware of six CCR facilities currently in Oklahoma. Approval of ODEQ's CCR application would allow the ODEQ regulations to apply to those existing CCR units as well as any future CCR units not located in Indian country in lieu of the Federal requirements.

EPA is not aware of any existing CCR units in Indian country within Oklahoma, but EPA will maintain sole authority to regulate and permit CCR units in Indian country, meaning formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.

## **III. EPA Analysis of Oklahoma's Application**

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<sup>1</sup> ODEQ's initial CCR permit program application, subsequent supplementation, and EPA's determination of completeness letter are available in the docket supporting this proposal.

As discussed in Section I.C. of this notice, the statute requires EPA to evaluate two components of a state program to determine whether it meets the standard for approval. First, EPA is to evaluate the adequacy of the permit program (or other system of prior approval and conditions) itself. See 42 U.S.C. 6945(d)(1)(A). Second, EPA is to evaluate the adequacy of the technical criteria that will be included in each permit, to determine whether they are the same as the federal criteria, or to the extent they differ, whether the modified criteria are “at least as protective as” the federal requirements. See 42 U.S.C. 6945(d)(1)(B). Only if both components meet the statutory requirements may EPA approve the program. See 42 U.S.C. 6945(d)(1).

On that basis, EPA conducted an analysis of ODEQ’s application, including a thorough analysis of OAC 252:517 and its adoption of 40 CFR Part 257, Subpart D. Based on this analysis, EPA has preliminarily determined that ODEQ’s submitted CCR permit program meets the standard for approval in section 4005(d)(1)(A) and (B). EPA is therefore proposing to approve Oklahoma’s application. Oklahoma’s program contains all the elements of the federal rule, including requirements for location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, recordkeeping, notification and internet posting requirements. It also contains state-specific language, references and state-specific requirements that differ from the federal rule, which EPA has preliminarily determined to be at least as protective as the Federal criteria. EPA’s analysis and preliminary findings are discussed in greater detail below and in the Technical Support Document.

Non-substantive changes include language inserts and deletions to enable the ODEQ to permit CCR units and enforce the Oklahoma rule. The revisions include: the removal of statements regarding national applicability; the inclusion of language to require submittal and approval of plans to ODEQ; the inclusion of permitting provisions to allow the ODEQ to

administer the CCR rules in the context of a permitting program; the inclusion of state-specific location restrictions; the inclusion of procedures for subsurface investigation; the inclusion of provisions addressing cost estimates and financial assurance.

Throughout Oklahoma's Chapter 517 rules, references for tribal notifications and/or approval that appear in the federal rule have been deleted along with the terms "Indian Country," "Indian Lands," and "Indian Tribe." EPA will retain sole authority to regulate and permit CCR units in Indian country as defined in 18 USC § 1151, which includes reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. EPA treats as reservations trust lands validly set aside for the use of a tribe even if the trust lands have not been formally designated as a reservation. *See, e.g., Oklahoma Tax Commission vs. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991).

*A. Adequacy of Oklahoma's Permit Program.*

RCRA section 4005(d)(1)(A) requires a State seeking program approval to submit to EPA an application with "evidence of a permit program or other system of prior approval and conditions under State law for regulation by the State of coal combustion residuals units that are located in the State."

RCRA section 4005(d)(1)(A) does not require EPA to promulgate regulations for determining the adequacy of State programs. EPA is therefore relying in large measure on the existing regulations in 40 CFR Part 239, Requirements for State Permit Program Determination of Adequacy, on the statutory requirements for public participation in RCRA Section 7004, and on the Agency's experience in reviewing and approving State programs in general. However, in order to aid States in developing their programs and to provide a clear statement of how, in EPA's judgment, the existing regulations and statutory requirements in both 4005(d) and 7004



apply to state CCR programs, on August 15, 2017 EPA announced the availability of an interim final Guidance for Coal Combustion Residuals State Permit Programs (82 FR 38685). This guidance outlines the process and procedures EPA generally intends to use to review and make determinations on State CCR permit programs. EPA evaluated the adequacy of ODEQ's permit program based on the statutory requirements and EPA's interpretation of the regulatory requirements. A summary of EPA's findings are below, organized by the program elements identified in the Part 239 regulations and the guidance document; our detailed analysis of the submitted State program can be found in the Technical Support Document which is included in the docket for this proposal.

#### *1. Permitting Guidelines*

Based on section 7004 and on the part 239 regulations, it is EPA's judgment (as expressed in the interim final guidance) that an adequate permitting program will provide for public participation by ensuring that: documents for permit determinations are made available for public review and comment; final determinations on permit applications are made known to the public; and public comments on permit determinations are considered.

All environmental permit and modification applications in Oklahoma are subject to the Oklahoma Uniform Environmental Permitting Act (UEPA) and the permitting rules promulgated to carry out UEPA. UEPA classifies all permit applications into three tiers that determine the level of public participation and administrative review the permit application will receive. See OAC 252:4-7-2. Oklahoma classifies solid waste management applications, including CCR applications, into their respective tiers at OAC 252:4-7-58 through 60. All permit documents, regardless of tier, are available for review and copying. OAC 252:4-1-5.

Oklahoma describes the Tier I program as “the category for those things that are basically administrative decisions which can be made by a technical supervisor with no public participation except for the landowner.” OAC 252:4-7-2. The Tier I permit application requires an application, notice to the landowner, and Department review. 27A O.S. § 2-14-103(9). Only applications for minor modifications, lateral expansions within the permit boundary below a certain capacity, and approval of technical plans fall within the Tier I category. OAC 252:4-7-58.

The Tier II permit application process expands upon the Tier I requirements to include published notice of the application filing and published notice of the draft permit or denial and opportunity for a public meeting. 27A O.S. § 2-14-103(10). The Tier II process covers new permits for on-site CCR disposal units and more substantial modifications to existing facilities beyond Tier I. OAC 252:4-7-59.

The Tier III permit application process includes the requirements of Tiers I and II and adds notice of an opportunity for a process meeting, response to public comments, and notice of an opportunity for an administrative permit hearing. 27A O.S. § 2-14-103(11). The Tier III process covers new permits for off-site disposal units and permits for some significant modifications to off-site disposal units. OAC 252:4-7-60.

UEPA provides for public notice and review of permit applications and significant permit modifications through its Tier II and III programs. Tier II and III programs also provide the opportunity for public hearing, and, in the case of Tier III applications, the opportunity for an administrative hearing. These programs appear to provide adequate opportunities for public participation in the permitting process, and the application of UEPA to the CCR permitting program is consistent with Oklahoma’s practice across environmental programs. Permit and modification applications for CCR facilities fall under the existing solid waste management

application at OAC 252:4-7-58 through 60, and those classifications are used for Oklahoma's authorized Municipal Solid Waste Landfill program.

### *2. Guidelines for Compliance Monitoring Authority*

Based on the part 239 regulations, it is EPA's judgment (as expressed in the interim final guidance), that a state's application for permit program approval should demonstrate that the state has the authority to gather information about compliance, perform inspections, and ensure that information it gathers is suitable for enforcement.

ODEQ has compliance monitoring authority under 27A O.S. § 2-3-501, allowing for inspections, sampling, information gathering, and other investigation. This authority extends to ODEQ's proposed CCR permit program and would provide the authority to adequately gather information for enforcement.

### *3. Guidelines for Enforcement Authority*

Further, based on the part 239 regulations, it is EPA's judgment (as expressed in the interim final guidance), that a state's application for permit program approval should demonstrate that the state has authority to administer RCRA §4005(c)(1)(B) and (C) programs to have adequate enforcement authority to administer those programs, including: the authority to restrain any person from engaging in activity which may damage human health or the environment, the authority to sue to enjoin prohibited activity, and the authority to sue to recover civil penalties for prohibited activity.

ODEQ appears to have adequate enforcement authority for its existing programs under 27A O.S. § 2-3-501-507 and that authority extends to ODEQ's proposed CCR permit program.

### *4. Intervention in Civil Enforcement Proceedings*

Based on section 7004 and on the part 239 regulations, it is EPA's judgment (as expressed in the interim final guidance) that a state application for permit program approval should demonstrate that the state provides adequate opportunity for citizen intervention in civil enforcement proceedings through the requirements found in 40 CFR 239.9. In general, those requirements state that the state must provide authority to allow citizen intervention or provide assurance of (1) a notice and public involvement process, (2) investigating and providing responses about violations, and (3) not opposing intervention when permitted by statute, rule, or regulation.

ODEQ's CCR program appears to satisfy the civil intervention requirement (40 CFR 239.9(a)) by allowing intervention by right. (see 12 OK Stat § 12-2024). In addition, ODEQ's CCR program would satisfy the requirements of 40 CFR 239.9(b) by providing a process to respond to citizen complaints (see 27A O.S. § 2-3-101,503) and by not opposing citizen intervention when allowed by statute (see 27A O.S. § 2-7-133). ODEQ in meeting 40 CFR 239.9(b)(2) has an extremely robust process for responding to citizen complaints. In 27A O.S. § 2-3-101-F-1, The complaints program is responsible for intake processing, mediation and conciliation of inquiries and complaints received by the Department and which shall provide for the expedient resolution of complaints within the jurisdiction of the Department. In 27A O.S. § 2-3-503, if the Department undertakes an enforcement action as a result of a complaint, the Department shall notify the complainant of the enforcement action by mail. The State program in 27A O.S. § 2-3-503 offers the complainant an opportunity to provide written information pertinent to the complaint within fourteen (14) calendar days after the date of the mailing. The State's program also goes further in 27A O.S. § 2-3-104 that the complaints program shall, in addition to the responsibilities specified by Section 2-3-101 of this title, refer, upon written

request, all complaints in which one of the complainants remains unsatisfied with the Department's resolution of said complaint to an outside source trained in mediation. It is clear that ODEQ takes public intervention seriously in enforcement actions considering the additional elements of the State's complaint process.

EPA has preliminarily determined that these requirements allow a minimum necessary level of citizen involvement in the enforcement process.

*B. Adequacy of Technical Criteria.*

EPA has preliminarily determined that ODEQ's submitted CCR permit program generally meets the standard for approval in RCRA section 4005(d)(1)(B)(i), as it will require each CCR unit located in Oklahoma to achieve compliance with the applicable criteria for CCR units under 40 CFR Part 257. To make this preliminary determination, EPA compared ODEQ's proposed CCR permit program to 40 CFR Part 257 to determine whether it differed from the federal requirements, and if so, whether those differences met the standard for approval in RCRA section 4005(d)(1)(B)(ii) and (C).

Oklahoma has adopted all of the technical criteria at 40 CFR Part 257, Subpart D into its regulations at OAC Title 252 Chapter 517. While ODEQ's CCR permit program also includes some modification of 40 CFR Part 257, Subpart D, the majority of ODEQ's modifications were merely those that were needed to allow the State to implement the part 257 criteria through a permit process. As mentioned above, the 40 CFR Part 257, Subpart D rules were meant to be implemented directly by the regulated facility, without the oversight of any regulatory authority, such as a state permitting program. For example, ODEQ removed 40 CFR 257.61(a)(2)(iv), which references the Marine Protection, Research, and Sanctuaries Act requirements because Oklahoma does not have any coastal or ocean environments which apply under the MPRSA

regulations. EPA considers these revisions to be ministerial, and as such, they do not substantively modify the federal technical criteria.

ODEQ also made a few minor changes to the 40 CFR 257, Subpart D criteria. These changes reflect the integration of the CCR rules with the responsibilities of other state agencies or state specific conditions. There are a few minor changes that were made inadvertently that will be changed by the State through another rulemaking, including a typographic error in Chapter 517-9-4(g)(5) and removal of the words “*and the leachate collection and removal*” from 40 CFR 257.70(e). The State has acknowledged these differences and has plans to correct any errors. Additional changes include removal of the web link to EPA publication SW-846 under the definition “*Representative Sample*” in 40 CFR 257.53; and the replacement of 40 CFR 257.91(e) with a reference to the Oklahoma Water Resources Board (OWRB) Section 785:35-7-2. After review of this OWRB regulation, an EPA groundwater expert finds the Oklahoma rules to be more stringent than the requirements under 40 CFR 257.91(e). EPA preliminarily finds these changes to be minor because the key aspects of the CCR program including requirements for location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, recordkeeping, notification and internet posting requirements are not substantially changed or reduced by the Oklahoma revisions and in one example is more stringent. These changes do not keep the overall program from being at least as protective as 40 CFR Part 257, Subpart D. EPA’s full analysis of Oklahoma’s CCR permit program can be found in the Technical Support Document (TSD) located in the docket for this notice.

#### **IV. Proposed Action**

In accordance with 42 U.S.C. 6945(d), EPA is proposing to wholly approve ODEQ's CCR permit program application.

Dated: January 3, 2018.

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Barry N. Breen,  
Principal Deputy Assistant Administrator,  
Office of Land and Emergency Management.  
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